

January 24, 2006

Clerk, U.S. Bankruptcy Court

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Below is an Opinion of the Court.

Elizabeth L Perris
ELIZABETH PERRIS
U.S. Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
ROMAN CATHOLIC ARCHBISHOP OF) No. 04-37154-elp11
PORTLAND IN OREGON, AND SUCCESSORS,)
A CORPORATION SOLE, dba the)
ARCHDIOCESE OF PORTLAND IN OREGON,)
Debtor.)

)

TORT CLAIMANTS COMMITTEE,) Adv. Proc. No. 04-3292
Plaintiff,)
v.) AMENDED MEMORANDUM OPINION
ROMAN CATHOLIC ARCHBISHOP OF) (TORT CLAIMANTS COMMITTEE'S
PORTLAND IN OREGON, AND SUCCESSORS,) THIRD MOTION FOR PARTIAL
A CORPORATION SOLE, dba the) SUMMARY JUDGMENT)
ARCHDIOCESE OF PORTLAND IN OREGON,)
et al.,)
Defendants.)

In this chapter 11¹ case of the Roman Catholic Archbishop of

¹ Unless otherwise indicated, all chapter and section references
(continued...)

1 Portland in Oregon, and Successors, a Corporation Sole, dba the
2 Archdiocese of Portland in Oregon ("debtor" or "the Archdiocese"), the
3 Archdiocese has taken the position that, although it holds legal title to
4 an extensive amount of real estate, most of that real estate is held in
5 trust and, thus, is not available to be used to pay the claims of
6 creditors. The Tort Claimants Committee ("TCC") filed this adversary
7 proceeding in part to avoid any unrecorded interests in real property
8 titled in debtor's name and to determine whether real property listed by
9 debtor in its Statement of Financial Affairs as being held for others is
10 property of debtor's bankruptcy estate. The TCC seeks through this
11 motion to (1) avoid any unrecorded interests in certain test properties,²

12 _____
13 ¹(...continued)

14 are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

15 ² The test properties consist of the real estate used by nine
16 parishes and one high school that debtor claims is held for the benefit
17 of the parishes and school. The parishes and school to be used to test
the parties' legal theories were chosen by debtor in an effort to make
discovery manageable in this adversary proceeding. The test properties
are associated with the following parishes and high school:

18 Immaculate Conception Parish, Stayton
19 Holy Redeemer Parish, Portland
20 St. Michael Parish, Oakridge, and its mission, St. Henry, Dexter
21 St. Birgitta Parish, Portland
22 St. Mary, Our Lady of the Dunes Parish, Florence
23 St. John Fisher Parish, Portland
24 St. Philip Benizi Parish, Redland
25 Queen of Peace Parish, Salem
26 St. Elizabeth Ann Seton Parish, Aloha
 Regis High School, Stayton

The properties associated with the parishes consist of parish churches,
schools, and cemeteries.

(continued...)

1 which debtor claims that it holds in trust, by using the bankruptcy
2 trustee's rights and powers as a hypothetical bona fide purchaser of the
3 real property on the date debtor filed bankruptcy; and (2) obtain a
4 declaration that debtor holds both legal and equitable title to the
5 properties so that they are part of debtor's bankruptcy estate. For the
6 reasons discussed below, the unrecorded equitable interests in the test
7 properties may be avoided and the estate owns both the legal and
8 equitable title to the test properties.

9

11 ²(...continued)

12 The TCC chose to seek summary judgment on less than all of the
13 parcels associated with the nine parishes and one school. It lists the
14 various parcels that are at issue in this motion by tax lot number in its
15 Exhibits 1 and 2 to its reply brief. The 33 parcels listed in the TCC's
16 Exhibits 1 and 2 do not correspond precisely with those parcels listed in
17 debtor's Amended Statement of Financial Affairs ("SOFA") as being held by
18 debtor for the nine parishes and one school. There are two discrepancies
19 that are apparent. For St. Michael Church, the SOFA lists five separate
20 parcels; the TCC includes only two in its list. For Immaculate
21 Conception Church, debtor's SOFA lists 13 parcels; the TCC lists only 12.

22 The TCC says on more than one occasion in its reply brief that the
23 parcel that is the subject of Exhibit 21 to the Affidavit of Malcolm
24 Newkirk, which is shown as Tax Account No. R103758, is not the subject of
25 this motion for partial summary judgment. It does not explain why that
26 lot and the three additional St. Michael Church lots are excluded from
this summary judgment proceeding. Defendants do not complain that this
motion does not address all of the test properties. It is the TCC's
motion, and it may choose the properties for which it seeks a ruling.
Therefore, I will not consider evidence regarding the parcel identified
as Tax Account No. R103758, or any evidence (if any has been submitted)
about the three excluded St. Michael's parcels.

None of the test properties involve the Missionaries of the Holy
Spirit. Therefore, the Missionaries are correct that this motion for
partial summary judgment does not directly affect it.

I. STANDARD FOR SUMMARY JUDGMENT

The court shall grant a party summary judgment on all or part of a claim or counterclaim "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056.

II. FACTS³

The Archdiocese is a corporation sole. Within the Archdiocese are 124 parishes and three Archdiocesan high schools. One parish is separately incorporated. The Archdiocese holds legal title to real properties associated with the unincorporated parishes and the Archdiocesan high schools. The real properties are used for parish churches, Catholic schools, and Catholic cemeteries. Parishioners and others contribute financially to the parishes and to the Archdiocesan schools. They also donate time and services to further the work of both the churches and the schools.

III. DISCUSSION

1. Avoidance of unrecorded interests under § 544(a)(3)

The filing of a bankruptcy petition creates an estate, which is comprised of "all legal or equitable interests of the debtor in property

³ The parties raised numerous evidentiary objections to the declarations filed in support of and in opposition to this motion. To the extent it is necessary for me to rule on the evidentiary objections, I specifically do so in this opinion. I need not rule on objections to evidence that did not affect my decision.

1 as of the commencement of the case," as well as any interests in property
2 that the bankruptcy trustee may recover under § 550. § 541(a)(1), (3).
3 Section 550 allows a trustee to recover for the benefit of the bankruptcy
4 estate any interests in property that have been avoided under § 544.
5 § 550(a).

6 In this case, debtor argues that most of the real property titled in
7 its name is held for the benefit of Catholic parishes and schools, and
8 therefore the property is not part of the bankruptcy estate that is
9 available to pay the claims of its creditors. The TCC argues that the
10 property is not held in trust but that, even if it is, under § 544(a)(3),
11 the TCC is entitled to avoid any beneficial interests in that property
12 that are not recorded in the real property records. The TCC has
13 clarified that this motion addresses only whether any equitable interests
14 that exist can be avoided under § 544(a)(3). This motion does not
15 address whether any such equitable interests, in fact, exist.

16 Bankruptcy Code § 544(a)(3) allows a bankruptcy trustee to avoid an
17 interest in property that would be voidable by a bona fide purchaser of
18 real property who has perfected the transfer as of the filing of the
19 case.⁴ This statute gives a trustee the rights of a hypothetical bona

⁴ Section 544(a) provides, as relevant:

The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by --

• • • •

(continued...)

1 fide purchaser. "The powers of a bona fide purchaser of real property
2 are defined by state law." In re Seaway Express Corp., 912 F.2d 1125,
3 1128 (9th Cir. 1990)(emphasis in original). Although the statute gives
4 the trustee powers to avoid transfers, it also applies when there has
5 been no transfer; it allows the trustee to avoid any unrecorded interests
6 in real property. Id. at 1129.

7 By order dated July 22, 2005, this court granted the TCC standing to
8 assert the § 544(a)(3) claim made in this adversary proceeding. See In
9 re Parmetex, Inc., 199 F.3d 1029,, 1031 (9th Cir. 1999)(bankruptcy court
10 may authorize a creditor to bring an avoidance action under § 544).

11 Defendants⁵ argue that the Bankruptcy Code provides that property in
12 which the debtor has only legal but not equitable title does not become
13 property of the estate, § 541(d),⁶ and that the TCC cannot avoid

14 ⁴(...continued)

15 (3) a bona fide purchaser of real property, other than
16 fixtures, from the debtor, against whom applicable law permits
17 such transfer to be perfected, that obtains the status of a
18 bona fide purchaser and has perfected such transfer at the time
of the commencement of the case, whether or not such a
purchaser exists.

19 ⁵ Defendants include the Archdiocese as well as others who claim
20 an interest in the properties. The adversary proceeding has been
21 designated a class action in order to allow everyone with a claimed
interest to be represented in and bound by the litigation.

22 ⁶ Section 541(a) provides that all legal or equitable interests
23 of the debtor in property as of the petition date become property of the
estate. Section 541(d) provides, however, that:

24 Property in which the debtor holds, as of the commencement of the
25 case, only legal title and not an equitable interest . . . becomes
26 property of the estate . . . only to the extent of the debtor's
(continued...)

1 unrecorded equitable interests in property titled in debtor's name,
2 because the property has never become property of the estate.

3 The Ninth Circuit has held that a trustee can avoid an unrecorded
4 interest of a person claiming a constructive trust in property held in
5 the name of a debtor. See Seaway Express Corp., 912 F.2d at 1128-29.
6 The court followed the majority rule "that § 541(d) does not limit the
7 trustee's powers over real property under § 544(a)(3)." Id. at 1128.
8 Accord In re Thomas, 147 B.R. 526 (9th Cir. BAP 1992), aff'd, 32 F.3d 572
9 (9th Cir. 1994)(table)(§ 544(a)(3) allows trustee to avoid equitable
10 interests in property that would be avoidable by a bona fide purchaser);
11 In re Chenich, 100 B.R. 512 (9th Cir. BAP 1987)(trustee can use
12 § 544(a)(3) to avoid equitable lien).

13 Defendants argue that an express or charitable trust is different
14 from a constructive trust, because a constructive trust is a remedy
15 imposed by a court for wrongdoing, while an express or charitable trust
16 is a true trust created intentionally by the parties. They argue that,
17 because the beneficiaries' equitable interests in property held in such
18 trust do not become part of the bankruptcy estate pursuant to § 541(d),
19 those interests could not be avoided by a bona fide purchaser of real
20 property under § 544(a)(3).

21 Although constructive trusts are a different species of trust from
22 trusts such as charitable or express trusts, that difference does not
23 affect the trustee's authority under § 544(a)(3) to avoid unrecorded

24 ⁶(...continued)

25 legal title to such property, but not to the extent of any equitable
26 interest in such property that the debtor does not hold.

1 equitable interests. In In re Tleel, 876 F.2d 769, 771-72 (9th Cir.
2 1989), the Ninth Circuit held that the trustee could avoid a claimed
3 interest in a constructive trust that had not been imposed under state
4 law before bankruptcy, because the trustee did not have constructive
5 notice of the existence of that trust. If the constructive trust had
6 been imposed by a state court prepetition, the equitable interests
7 arising out of that constructive trust would not have been avoidable,
8 because the state court judgment imposing the trust would have given a
9 bona fide purchaser notice of the interest in the property. Thus, it was
10 not the character of the trust that determined whether the interest was
11 avoidable, but whether there was constructive notice of that interest at
12 the time of bankruptcy.

13 Applying that reasoning to this case, the question is whether, under
14 state law, a bona fide purchaser of the real property on the date of the
15 petition would have had notice that someone other than debtor might have
16 interests in the property.

17 All of the test properties are located in Oregon. Under Oregon law,
18 a good faith purchaser of real property for valuable consideration takes
19 the property free of unrecorded interests in the property. ORS
20 93.640(1).⁷

21
22 ⁷ That statute provides, as relevant here:

23 (1) Every conveyance, deed, land sale contract, assignment of all
24 or any portion of a seller's or purchaser's interest in a land sale
25 contract or other agreement or memorandum thereof affecting the
title of real property within this state which is not recorded as
provided by law is void as against any subsequent purchaser in good
26 (continued...)

1 The notice that will deprive the [subsequent purchaser] of priority
2 can be either actual or constructive. Actual notice is direct
3 knowledge of the outstanding interest. Constructive notice
4 encompasses both notice chargeable under the recording statute . . .
5 and "inquiry notice."

6 High v. Davis, 283 Or. 315, 333 (1978). Bankruptcy law makes actual
7 notice irrelevant to a trustee's avoidance of an unrecorded interest in
8 real property. See 5 Lawrence P. King, Collier on Bankruptcy ¶ 544.02
9 (15th ed. Rev. 2005).⁸ Therefore, the question is whether there was
10 constructive notice of the asserted interests of the defendants in this
11 case.

12 Oregon's recording statute provides that, in order "[t]o give
13 constructive notice of an interest in real property," a person must have
14 recorded that interest in the real property records of the county in
15 which the property is located. ORS 93.643(1). Inquiry notice, on the
16 other hand, "arises when the existence of a claimed interest in real
17 property may be determined through investigation based on facts available
18 to the claimant that would cause a reasonable person to make such
19 inquiry." Gorzeman v. Thompson, 162 Or. App. 84, 93 (1999).

20 _____
21 ⁷(...continued)

22 faith and for a valuable consideration of the same real property, or
23 any portion thereof, whose conveyance, deed, land sale contract,
24 assignment of all or any portion of a seller's or purchaser's
25 interest in a land sale contract or other agreement or memorandum
26 thereof is first filed for record, and as against the heirs and
 assigns of such subsequent purchaser.

27 ⁸ Section 544(a) provides that a bankruptcy trustee may avoid any
28 interest in property that is avoidable by a bona fide purchaser, "without
29 regard to any knowledge of the trustee or of any creditor"

1 A. Record notice

2 The TCC argues that, because title to all of the test properties is
3 in the name of debtor, there is no record notice of any claimed interests
4 of the defendants in the real property records for any of the test
5 properties. The TCC provides title reports for all properties at issue;
6 all show debtor as the record owner. Affidavit of Malcolm Newkirk in
7 Support of Tort Claimants Committee's Third Motion for Partial Summary
8 Judgment Exh. 1 - 20; 22.

9 None of the defendants explicitly argue that there is record notice
10 of their asserted interest in the properties. The Committee of Catholic
11 Parishes, Parishioners and Interested Parties ("Parish Committee") points
12 out that three documents in the real property records for the test
13 properties⁹ refer to parishes: Newkirk Affidavit Exh. 1 p. 16 lists the
14 owner of property subject to an Agreement to Waive Rights to Notice,
15 Hearing and Remonstrance as "Archdiocese of Portland By St. Elizabeth Ann
16

17 ⁹ The Parish Committee also points to Exh. 21 to the Newkirk
18 Affidavit, which is a preliminary title report that shows title to the
19 particular parcel is vested in "Roman Catholic Archbishop of Portland in
20 Oregon and successors, a corporation sole for the benefit of Immaculate
Conception Church[.]"

21 As I have explained above in footnote 2, I will not consider the
22 evidence contained in Exh. 21, which relates to Tax Account No. R103758,
because the TCC is not seeking any ruling with regard to that parcel.

23 In its response to the TCC's Concise Statement of Facts, the Parish
24 Committee also refers to Exh. 5 p. 37 and Exh. 8 pp. 5, 12, and 13, all
25 of which are plot maps that show the names of the respective parish
26 churches (Holy Redeemer and Queen of Peace). The Parish Committee does
not rely on those map references to argue that there is record notice of
asserted interests of defendants in the properties.

1 Seton Catholic Church;" his Exh. 7 p. 27 shows a reference in a city
2 ordinance affecting the disputed property to a petition filed by "the
3 Archdiocese of Portland in Oregon for the St. John Fisher Parish;" and
4 Exh. 7 p. 54 shows an Agreement for Use of Property between "Archdiocese
5 of Portland in Oregon/St. John Fisher Church."

6 None of the exhibits show ownership by anyone other than debtor. I
7 have concluded in my ruling on the TCC's Second Restated Motion for
8 Partial Summary Judgment that the parishes are not separate civil
9 entities that can hold title to property or hold beneficial interests in
10 their own right. They are simply divisions or parts of debtor.
11 Reference in the real property records to a parish that is a part of
12 debtor is the same as a reference to debtor. Therefore, I conclude that
13 there is no genuine issue of material fact that there is no record notice
14 of the asserted interests of defendants in the test properties.

15 B. Inquiry notice

16 As I explained above, constructive notice has long been made up of
17 two different concepts: record notice and inquiry notice. The TCC argues
18 that the Oregon legislature's 1987 enactment of ORS 93.643 abolished
19 inquiry notice in Oregon, leaving only constructive notice based on the
20 recording of a property interest in the real property records. It points
21 to the language of ORS 93.643(1), which says that constructive notice of
22 an interest in real property is given by recording the interest in the
23 real property records of the county in which the property is located, and
24 that "[s]uch recordation, and no other record, constitutes constructive
25 notice to any person of the existence of the interest, [with exceptions

1 not applicable here]." ORS 93.643(1)(emphasis supplied).

2 In interpreting Oregon statutes, the court "is to discern the intent
3 of the legislature." Portland Gen. Elec. Co. v. Bureau of Labor and
4 Indus., 317 Or. 606, 610 (1993). In doing that, a court must first look
5 at the text of the statutory provision, which provides the best evidence
6 of the legislature's intent. Id. Also considered at this first level is
7 the context of the statutory provision. Id. If the legislature's intent
8 is clear from that inquiry, "further inquiry is unnecessary." Id. at
9 611. If, however, the statute is ambiguous, then the court looks to
10 legislative history. Id. If, after considering text, context, and
11 legislative history, the meaning of the statute is still not clear, "the
12 court may resort to general maxims of statutory construction to aid in
13 resolving the remaining uncertainty." Id. at 612.

14 I conclude that the statutory language is ambiguous. The language
15 in the statute that "[s]uch recordation, and no other record, constitutes
16 constructive notice" could be read to mean that only the recording of an
17 interest in real property as provided in the statute will constitute
18 constructive notice, thereby abolishing the concept of inquiry notice in
19 Oregon. However, it could also be read to say that record constructive
20 notice can be accomplished only by compliance with the statute. Such an
21 interpretation would not affect constructive notice arising from inquiry
22 notice.

23 The context of the statute provides a clue into the legislature's
24 intent. ORS 93.643 is found in a chapter of the Oregon Revised Statutes
25 relating to "Conveyancing and Recording." It falls within a series of

1 statutes that come under the heading "Recordation and its Effects."
2 Because the statutes relate to recordation and not inquiry notice, it
3 appears the legislature was contemplating clarifying recording
4 requirements, not changing long-settled Oregon law on inquiry notice.
5 The placement of ORS 93.643 in the recording statutes lends weight to the
6 interpretation that the statute affects only record constructive notice,
7 not constructive notice arising out of the duty to inquire. However, the
8 context does not clarify the intent sufficiently to end the analysis.

9 The next step is to consider the legislative history. None of the
10 parties has provided any legislative history that would bear on the
11 interpretation of this statute.¹⁰

12 Therefore, I move to the third level of analysis, application of
13 rules of statutory construction. None of the parties cite to any rules
14 of statutory construction that are helpful to a determination of the
15 question presented here, and I do not find any that are helpful.

16 The only indication of legislative intent that bears on the
17 interpretation of this statute is its placement in the statutes dealing
18 with the effects of recording. If the legislature had intended to
19 abolish inquiry notice, which has been the law of Oregon for many years,
20 one could expect that the legislature would make that intent clear. In
21 light of the legislature's silence with regard to any effect the 1987
22 amendment was intended to have on inquiry notice, and the legislature's
23 placement of the amending language in a statute dealing with the effect

24
25 ¹⁰ I do not consider the Declaration of Craig M. Chisholm,
26 submitted by debtor in opposition to the TCC's motion, to bear on the
legislative history of this 1987 provision.

1 of recording, I conclude that the legislature did not intend to abolish
2 inquiry notice in Oregon.

3 This conclusion is supported by the fact that, despite the enactment
4 of ORS 93.643 in 1987, Oregon courts have continued to consider and apply
5 the rules of inquiry notice. E.g., Akins v. Vermast, 150 Or. App. 236,
6 adhered to on reconsideration, 151 Or. App. 422 (1997); Vandehey Dev. Co.
7 v. Suarez, 108 Or. App. 154 (1991). See also Spady v. Graves, 307 Or.
8 483, 488 n.3 (1989)(explaining that constructive notice can be either
9 record notice under the statutes or inquiry notice).

10 "Inquiry notice . . . arises when the existence of a claimed
11 interest in real property may be determined through investigation based
12 on facts available to the claimant that would cause a reasonable person
13 to make such inquiry." Gorzeman v. Thompson, 162 Or. App. 84, 93 (1999).
14 The purchaser is "charged with notice of every fact that a reasonable
15 inquiry would have disclosed." Vandehey Dev. Co., 108 Or. App. at 157.
16 In order to be charged with notice of facts a reasonable inquiry would
17 have disclosed, there first must be facts that would cause a reasonable
18 person to make such inquiry. In other words, there must be a duty to
19 inquire before the purchaser is charged with notice of what she would
20 have learned had she made the inquiry.

21 Defendants point to numerous facts that they assert would give rise
22 to a duty of a purchaser to inquire into whether there were unrecorded
23 interests in the properties.

24 i. Debtor's statement of financial affairs

25 Marist High School argues that debtor's statement of financial
26

1 affairs provided information sufficient to put a bona fide purchaser on
2 notice of the existence of equitable interests in the test properties,
3 because debtor listed the parish and school properties as properties held
4 for others.

5 A trustee is given the status of a bona fide purchaser of real
6 property "at the time of the commencement of the case." § 544(a)(3).
7 The hypothetical bona fide purchaser created by § 544(a)(3) is "one who
8 is without actual knowledge 'at the instant the petition is filed,' and
9 purchases property from the debtor for value and in good faith." In re
10 Professional Invest. Prop. of Am., 955 F.2d 623, 628 n.3 (9th Cir. 1992).
11 Thus, the trustee is charged with notice of facts in existence as of the
12 moment the petition is filed. The Ninth Circuit Court of Appeals has
13 held that, where the debtor's bankruptcy schedules are filed with the
14 petition, facts set out in those schedules can provide constructive
15 notice that someone other than the debtor claims an interest in property
16 to which the debtor holds title. Id. Where, however, the schedules are
17 not filed along with the petition but are filed at a later date, the
18 information would not be available to a bona fide purchaser as of the
19 moment of filing, and therefore information contained in those schedules
20 does not deprive the trustee of the status of a bona fide purchaser. In
21 re Castro, 158 B.R. 180 (Bankr. C.D. Cal. 1993).

22 In this case, debtor filed its bankruptcy petition on July 6, 2004
23 and did not file its schedules and statement of financial affairs until
24 July 30, 2004. Thus, the information contained in the statement of
25 financial affairs was not available upon the filing of the petition and
26

1 therefore could not have provided constructive notice of defendants'
2 asserted equitable interest in property to a bona fide purchaser as of
3 the petition date. The later-filed statement of financial affairs does
4 not defeat the TCC's status as a bona fide purchaser with respect to the
5 test properties.

6 Defendants also argue that the petition itself should have raised
7 questions about other interests in property, because debtor indicated on
8 its petition that it had between \$10,000,001 and \$50 million in assets.
9 According to defendants, a purchaser on that date should have realized
10 from the valuation of debtor's assets that it was asserting that someone
11 other than debtor had interests in some of debtor's property.

12 The mere listing of the value of assets is not sufficient to raise
13 questions about unrecorded ownership interests in particular property
14 titled in debtor's name. The fact that debtor showed assets of no more
15 than \$50 million did not raise a duty of inquiry into ownership interests
16 in particular parcels of property.

17 ii. Title report documents and deeds

18 Next, defendants argue that some of the title report documents show
19 a beneficial interest of the parishes (St. Elizabeth Ann Seton and St.
20 John Fisher), and that "many of the warranty deeds" require taxes and
21 recorded title to be sent to the parishes, not to the debtor's offices.
22 Parish Committee Memorandum in Opposition to Plaintiff's Third Motion for
23 Partial Summary Judgment at 9.

24 As I explained above in discussing record notice, the reference to
25 the two parishes in the recorded documents does not give record notice of
26

1 a claimed interest by someone other than debtor. The parishes are part
2 of debtor, so mention of the parishes in title report documents does not
3 give rise to a duty to inquire whether someone other than debtor had an
4 interest in the property.¹¹

5 As to the requirement in "many of the warranty deeds" that certain
6 official documents be sent to the parishes, the Parish Committee points
7 to only two such references, both relating to St. Philip Benizi Church:
8 Exhibit 4 to Newkirk's Affidavit p. 11 shows that the warranty deed for
9 one parcel of property provides that tax statements and the recorded deed
10 are to be sent to the Archdiocese of Portland in Oregon, at what appears
11 to be the address of the parish church. Page 13 of that exhibit shows
12 the address for the taxpayer Archdiocese of Portland OR as "St. Philip
13 Benizi - Redland 2838 E. Burnside St., Portland, OR 97214 USA." In both
14 of those documents, the record owner is listed as debtor. The fact that
15 the address debtor gives for receipt of official documents is the address
16 of the local parish is not sufficient to raise a duty of inquiry into
17 whether some third party may claim an unrecorded interest in the
18 property.

19 Regis High School argues that a purchaser would have a duty to
20 inquire as to the Regis property, because the Regis property was deeded
21 to debtor by Catholic Educational Corporation. Declaration of Brad T.

22

23 ¹¹ None of the recorded documents relating to the test properties
24 contain trust language such as "for the benefit of" a particular parish
25 or school. Although I have already held that a parish or school that is
26 not separately incorporated cannot be a beneficiary of a trust, I express
no opinion about whether such language of trust could be sufficient to
give rise to a duty to inquire.

1 Summers Exh. 34 p. 1. Regis claims that the identity of the grantor
2 should cause a purchaser to inquire further into the ownership of the
3 property, because a purchaser should have realized that a corporation
4 called Catholic Educational Corporation likely would have a charitable
5 purpose, and that a transfer from that charitable corporation to debtor,
6 which is another charitable corporation, should raise questions about the
7 beneficial interest in the property.

8 I do not see how the character of the entity that transferred the
9 property to debtor should excite inquiry into whether someone other than
10 the record title holder might have an interest in the properties. First,
11 there is no reason a purchaser would have inquired into the character of
12 the grantor to learn whether it was a charitable corporation incorporated
13 for a particular educational purpose. What would matter is that the
14 grantor had good title to transfer. Second, the property was deeded to
15 debtor alone. Regis does not point to any authority that would prohibit
16 a grantor that is a charitable organization from deeding property without
17 restriction to a third party. I conclude that the real property records
18 do not give rise to inquiry notice.¹²

19 iii. Debtor's existence as a corporation sole

20 Defendants argue that the very character of debtor as an
21 ecclesiastical entity should excite inquiry that it might be holding
22 property for the benefit of others. They rely on the Oregon religious
23

24 ¹² Even if Regis's argument were correct, the argument applies
25 only to one of two parcels of real property that make up the Regis
26 properties. The second parcel was deeded to debtor by individuals, not
by a corporation. See Declaration of Brad T. Summers Exh. 35.

1 corporation statutes and debtor's articles of incorporation, arguing that
2 those authorities require reference to canon law, which limits debtor's
3 authority with regard to the real property it holds for parishes.

4 Debtor is a corporation sole, organized under Oregon law. A
5 corporation sole differs from other nonprofit corporations under Oregon
6 law "only in that it shall have no board of directors, need not have
7 officers and shall be managed by a single director who shall be the
8 individual constituting the corporation and its incorporator or the
9 successor of the incorporator." ORS 65.067(1).

10 Unless a nonprofit corporation's articles of incorporation provide
11 otherwise, such corporations have the power to, among other things,
12 "[p]urchase, take by gift, devise or bequest, receive, lease or otherwise
13 acquire, and own, hold, improve, use and otherwise deal with, real or
14 personal property or any interest in property, wherever located." ORS
15 65.077(5). Nonprofit corporations may also "[s]ell, convey, mortgage,
16 pledge, lease, exchange, transfer and otherwise dispose of all or any
17 part of its property." ORS 65.077(6). ORS 65.531(2) provides that a
18 nonprofit corporation may sell or otherwise dispose of substantially all
19 of its property in the regular course of business, and that no approval
20 by the members of the corporation or anyone else is required unless
21 required by the articles of incorporation. Because the statutes
22 expressly authorize a nonprofit corporation, including a corporation
23 sole, to buy and sell real property, without approval by anyone else, the
24 fact that the record owner is a corporation sole would not excite inquiry
25 into other, unrecorded interests.

1 Defendants argue that the corporation sole statute and other
2 religious corporation statutes require reference to canon law to
3 determine the authority of the corporation sole to convey property. As I
4 discussed in ruling on the TCC's Restated Second Motion for Partial
5 Summary Judgment, the reference in the corporation sole statute to canon
6 law¹³ does not incorporate canon law into the law of Oregon, and the
7 references to religious or canon law in other nonprofit corporation
8 statutes, ORS 65.042 (religious doctrine and practice can take precedence
9 over nonprofit corporation law under certain circumstances); ORS 65.077
10 (power of nonprofit corporation conditioned on its articles of
11 incorporation); and ORS 65.357(2)(d) and 65.377(2)(c)(permitting
12 religious corporations to rely on information provided by religious
13 authorities in managing the corporation), would not excite inquiry into
14 whether the corporation sole has limits on its authority to convey
15 property, other than those set out in the corporation statutes and the
16 articles of incorporation. The statutes do not provide that real
17 property transactions of religious corporations are governed by the law
18 of the religion; they merely allow such corporations to look to canon law
19

20 ¹³ ORS 65.067(1) provides:

21 Any individual may, in conformity with the constitution,
22 canons, rules, regulations and disciplines of any church or
23 religious denomination, form a corporation hereunder to be a
24 corporation sole. Such corporation shall be a form of religious
25 corporation and will differ from other such corporations organized
26 hereunder only in that it shall have no board of directors, need not
have officers and shall be managed by a single director who shall be
the individual constituting the corporation and its incorporator or
the successor of the incorporator.

1 in their internal affairs, including in deciding whether they may,
2 consistent with their internal church law, incorporate as a corporation
3 sole.

4 The statutes do, however, provide that a nonprofit corporation's
5 powers are subject to what is set out in the articles of incorporation
6 for the corporation. ORS 65.077. A purchaser of property from a
7 corporation sole would, therefore, look to debtor's articles of
8 incorporation to determine whether they somehow limit that authority
9 granted by statute.

10 A purchaser reviewing debtor's articles of incorporation would not
11 find anything inconsistent with the authority granted by statute to own
12 and sell property. Debtor's original articles of incorporation, filed in
13 1874, provide for the incorporation of debtor as a corporation sole, and
14 that

15 the object and purpose of this corporation is to provide for and
16 maintain the worship of Almighty God, and the preaching of the
17 gospel of our Lord Jesus Christ, according to the doctrine, canons,
18 rules and usages of the Roman Catholic Church; to establish and
19 maintain educational and charitable institutions for the promotion
of piety and learning, and the maintenance of the poor, sick and
impotent; and for acquiring, holding and disposing of church
property for the benefit of the Roman Catholic Church for works of
charity and for public worship.

20 Articles of Incorporation, Declaration of Albert Kennedy in Support of
21 Third Motion for Partial Summary Judgment Exh. 2 p. 8 (emphasis
22 supplied).

23 Debtor is the surviving corporation of a 1991 merger between the
24 Archdiocese of Portland in Oregon and the Roman Catholic Archbishop of
25 the Archdiocese of Portland in Oregon. Declaration of Albert Kennedy in
26

1 Support of Third Motion for Partial Summary Judgment Exh. 1 pp. 22-23.

2 The terms and conditions of the merger included:

3 Each merging corporation is a religious corporation organized for
4 the purpose of holding and administering the assets of and
5 conducting the corporate purposes and mission of the Roman Catholic
6 Archdiocese of Portland in Oregon.

7 Id. at p. 23 (emphasis supplied). Defendants do not point to any
8 language in the articles of incorporation that in any way limits debtor's
9 authority to convey real property to third parties, or that conditions
10 such conveyance on approval of parishes or schools or parishioners or
parents and students of the schools.

11 As I explained in my ruling on the Second Restated Motion for
12 Partial Summary Judgment, one of the very purposes of a religious
13 organization incorporating as a corporation sole is to create a civil
14 legal entity that can hold and convey real property. Nothing in the
15 Oregon nonprofit corporation statutes or debtor's articles of
16 incorporation would excite inquiry into whether debtor was holding title
17 to real property in trust for some other beneficial interests. Nor would
18 either of those sources cause a reasonable purchaser to refer to canon
19 law to determine whether there might be some unrecorded interests in the
20 property.

21 I conclude that debtor's existence as a corporation sole would lead
22 a reasonable purchaser to inquire into the corporation sole statutes and
23 debtor's articles of incorporation, and that both of those sources
24 confirm debtor's authority to convey real property without limitation.
25 Neither source would cause a reasonable purchaser to inquire into whether

1 anyone other than debtor had an unrecorded interest in the property.

2 iv. Possession, use, and maintenance of properties by parishes
3 and schools

4 Defendants argue that a purchaser of real property from debtor would
5 have a duty to inquire into whether there were any unrecorded interests
6 in the property, based on the possession, use and maintenance of the
7 properties by the parishes and schools. According to defendants, a
8 reasonable and prudent purchaser would question why property titled in
9 the name of debtor is occupied, used, and maintained by parishes and
10 schools.

11 Under Oregon law, possession of real property by a third party other
12 than the grantor puts "a purchaser upon inquiry as to the possessor's
13 interest." Webb v. Stewart, 255 Or. 523, 536 (1970). This is because
14 the possession by someone other than the grantor "is a fact inconsistent
15 with the record title[.]" Id. (quoting Groff v. State Bank of
16 Minneapolis, 50 Minn. 234, 238 (1892)).

17 In this case, even considering all of the evidence presented by
18 defendants that bears upon possession of the test properties,¹⁴ the facts
19 would not lead a reasonable and prudent person to inquire into whether
20 defendants claim any unrecorded interest in the properties.

21 Each of the parcels that make up the test properties is used as a

22

23 ¹⁴ The TCC has filed an omnibus evidentiary objection to most if
24 not all of that evidence. Because I conclude that, even considering the
25 evidence presented by defendants, they have not established a genuine
26 issue of material fact with regard to inquiry notice, I will not consider
whether to exclude the evidence on the various grounds asserted by the
TCC.

1 Catholic church, a Catholic school, or a Catholic cemetery. The church
2 properties are occupied by parish priests, other employees, and
3 parishioners; the school properties by students, teachers, and
4 administrators. To the extent there are identifying signs on the
5 premises, those signs show the name of the parish or school; they do not
6 mention debtor.

7 Defendants argue that the signs on the property, reflecting the name
8 of the parish or the school, would lead a reasonable person to question
9 whether the parish or school had an interest in the property, because
10 title is held by the Archdiocese, not by the parish or school. However,
11 as I have already explained, the parishes and schools are simply parts or
12 divisions of debtor. If a reasonable prospective purchaser were to look
13 in the state's corporate records, the purchaser would see that none of
14 the parishes, churches, schools, or cemeteries are separately
15 incorporated so that they could hold real property interests in their own
16 behalf. If the purchaser were to visit debtor's website, the purchaser
17 would see that the parishes are listed as "Parishes of the Archdiocese of
18 Portland." It is unremarkable that real property owned by a church
19 organization, here the Archdiocese, is occupied by and used as churches,
20 schools, and cemeteries and is frequented by parishioners of the
21 churches, students and teachers of the schools, and people visiting
22 cemeteries. Having a sign on the property that shows that the property
23 is occupied by a division of the title owner would not give rise to
24 inquiry about whether there is some other unrecorded interest in the
25 property.

1 Nor does the use of the properties as Catholic churches, schools,
2 and cemeteries raise a question about record title. The Archdiocese is
3 authorized by its articles of incorporation to acquire, hold, and dispose
4 of church property "for public worship." Articles of Incorporation,
5 Declaration of Albert Kennedy in Support of Third Motion for Partial
6 Summary Judgment Exh. 2 p. 8. The existence of Catholic churches,
7 Catholic schools, and Catholic cemeteries on property titled in the name
8 of the Archdiocese is entirely consistent with record title.

9 Similarly, the fact that a purchaser would find on the premises
10 priests at the parishes and school administrators for the school is
11 entirely consistent with ownership by the highest authority of the church
12 in this region. It is undisputed that the parish priests are assigned to
13 the parishes by the Archbishop. The employees of the parishes are
14 Archdiocesan employees. The school administrators and teachers are
15 Archdiocesan employees.¹⁵ Possession of property by agents of the record

17 15 These facts are established through Exhibit 3 to the Second
18 Declaration of Michael Fletcher in Support of the TCC's Third Motion for
19 Summary Judgment. Debtor moves to strike this exhibit, arguing that it
is the same exhibit the court denied the TCC leave to file in connection
with the Second Restated Motion for Partial Summary Judgment.

20 My ruling denying the TCC's motion for leave to file a supplemental
21 response in connection with the Second Restated Motion was based on the
22 fact that it was untimely under the briefing schedule for the Second
23 Restated Motion, not for any substantive reason. I will not strike it
from the record for the Third Motion for Partial Summary Judgment,
because it was timely submitted in support of that motion.

24 Debtor also argues that its personnel policies and employee benefits
25 are irrelevant to the issue of inquiry notice. I consider the exhibit,
which is the Archdiocese's Employee Handbook for School and Parish
26 (continued...)

1 owner does not excite inquiry into whether other unrecorded interests
2 exist in the property.

3 The fact that parishioners are often on the properties engaging in
4 various activities, including maintenance and service functions, does not
5 excite inquiry. A parish church or parochial school would be expected to
6 be frequented and maintained by parishioners or others who are committed
7 to the mission of the parish and school. There is nothing inconsistent
8 with record title in the use or maintenance of church and school property
9 by parishioners and persons committed to the school mission.

10 Even considering the evidence presented by defendants bearing on
11 inquiry notice arising from use of the properties by the parishes,
12 schools, and cemeteries, I conclude that there is no genuine issue of
13 material fact and that such possession and use is not sufficient to give
14 rise to a duty of a reasonable and prudent prospective purchaser to
15 inquire into whether there are interests in the test properties that are
16 not reflected in the real property records.

17 v. Internal church practice

18 Defendants argue that, because parish and school property cannot as
19 a matter of practice be sold without the input and consent of the parish
20 priest or school administrator, a prudent purchaser would question
21 whether the parishes or schools have interests in the properties that are
22 not reflected in the title. However, the duty to inquire is not
23

24 ¹⁵(...continued)

25 Personnel, as relevant evidence that persons employed at the parishes and
26 schools are Archdiocesan employees, not employees of the parishes or
schools. Thus, I will not strike the exhibit.

1 triggered by what one might learn if, in fact, one were to actually
2 inquire.

3 "If a purchaser, or encumbrancer, dealing concerning property, of
4 which the record title appears to be complete and perfect, has
5 information of extraneous facts, or matters *in pais*, sufficient to
6 put him on inquiry respecting some unrecorded conveyance, mortgage,
7 or encumbrance, or respecting some outstanding interest, claim, or
right which is not the subject of record, and he omits to make
proper inquiry, he will be charged with constructive notice of all
facts which he might have learned by means of a due and reasonable
inquiry."

8 Petrain v. Kiernan, 23 Or. 455, 457-58 (1893)(quoting 2 Pom. Eq. Jur.
9 §§ 613, 615). There must first be facts that would lead a reasonable
10 person to inquire into other possible interests in the property, that is,
11 that would give rise to a duty to inquire. Only if there is a duty to
12 inquire is one charged with the facts that would be learned on inquiry.¹⁶

14 ¹⁶ Debtor provided the declaration of Craig M. Chisholm, in which
15 he says that, "Inquiry notice certainly includes both what could be
16 ascertained by an inspection of the land and what could be ascertained by
17 making inquiry of persons in possession thereof." Declaration of Craig
18 M. Chisholm ¶ 9. That statement is a legal conclusion, not a factual
19 assertion. Declarations or affidavits submitted in opposition to a
motion for summary judgment are to set out "such facts as would be
admissible in evidence[.]" Fed. R. Civ. P. 56(e). A legal conclusion is
not a fact admissible in evidence. Therefore, I will strike ¶ 9 of
Chisholm's declaration.

20 Debtor argues that the statement is admissible as an expert opinion.
21 I can reach opinions about what the law is without considering the
opinion of a legal expert.

22 Further, Chisholm's statement does not say that the duty to inquire
23 is triggered by making the inquiry. Inquiry notice is comprised of two
24 steps: first, the duty to inquire, and second, the facts that would be
25 learned on inquiry. It is not clear whether Chisholm in his statement is
saying that the duty to inquire is triggered by what would have been
learned if inquiry had been made, or rather that inquiry notice includes
(continued...)

1 Although someone inquiring about purchasing property titled in the
2 name of the Archdiocese of Portland and occupied by Catholic churches,
3 schools, and cemeteries might be told that the parish or school needed to
4 agree to the sale, that fact does not give rise to a duty to make the
5 inquiry in the first place.

6 vi. Publicity

7 Finally, the Parish Committee argues that there could be no bona
8 fide purchaser of the test properties as of the petition date, because
9 publicity before debtor's bankruptcy filing date informed the public that
10 parishes were asserting an interest in property on which parishes
11 operate. It relies on two newspaper articles, one from the Boston Globe
12 dated June 2, 2004, and one from the Oregonian dated May 23, 2004. I
13 agree with the TCC that the article from the Boston Globe is irrelevant;
14 the question here is whether there was sufficient information available
15 to a reasonable prudent purchaser of real property from debtor on the
16 petition date to give rise to a duty to inquire into other possible
17 interests in the property that were not of record. Events occurring in
18 Boston relating to the Boston Archdiocese are not relevant to information
19 relating to the Archdiocese of Portland.¹⁷

20 The TCC also argues that the Oregonian article is inadmissible
21 because it is both irrelevant and hearsay. I need not decide whether to

23 ¹⁶(...continued)
24 inspection, which could give rise to the duty to inquire, which would
lead to facts learned upon actual inquiry.

25 ¹⁷ Therefore, I will strike Exhibit 2 to the Declaration of Mark
26 Edlen.

1 strike the article because, even taking it into consideration, I conclude
2 that it does not give rise to inquiry notice. Whether or not pervasive
3 publicity about an asserted interest in property might be sufficient to
4 put a prudent purchaser on notice to inquire further about the grantor's
5 ability to pass clear title, see In re Merrill Lynch & Co., Inc., 273 F.
6 Supp. 2d 351 (S.D.N.Y. 2003), aff'd on other grounds, 396 F.3d 161 (2d
7 Cir. 2005) (numerous newspaper articles gave inquiry notice of possible
8 claim for securities fraud); Barnett v. City of Yonkers, 731 F. Supp. 594
9 (S.D.N.Y. 1990) (newspaper articles gave constructive notice of hazards of
10 exposure to asbestos for purposes of wrongful death action), one article
11 cannot be said to be pervasive publicity. The properties at issue in
12 this case are located throughout the western part of Oregon. A single
13 article appearing in even a newspaper of large circulation in the state
14 is not sufficient to excite inquiry.

15 I conclude that there is no genuine issue of material fact that the
16 TCC is entitled under § 544(a)(3) to avoid any unrecorded interests in
17 the test properties.

18 2. First Amendment and the Religious Freedom Restoration Act ("RFRA")

19 Defendants assert that, if § 544(a)(3) allows avoidance of their
20 asserted beneficial interests in the test properties, application of
21 § 544(a)(3) would violate the First Amendment and RFRA, 42 U.S.C.
22 § 2000bb - 2000bb-4.¹⁸

23

24 ¹⁸ In a footnote in its opposition brief, the Parish Committee
25 raises for the first time the argument that applying § 544(a)(3) to avoid
pre-1978 unrecorded interests in property would violate the Fifth
26 (continued...) (continued...)

1 I have discussed and disposed of defendants' First Amendment and
2 RFRA arguments in my ruling on the Second Restated Motion for Partial
3 Summary Judgment. I have concluded that there is a question of fact
4 whether application of the avoidance powers under § 544(a)(3) might
5 substantially burden the exercise of religion in violation of RFRA, if it
6 were to result in the loss of so many parish churches and Archdiocesan
7 high schools that it would leave defendants with no place to worship and
8 study. This motion involves only the test properties, not a significant
9 number of the properties on which Archdiocesan churches and schools are
10 located. Allowing the TCC to avoid the unrecorded interests in the test
11 properties would leave 115 other parishes (there are 124 parishes in the
12 Archdiocese of Portland) where parishioners could worship, and two
13 Archdiocesan high schools where children could obtain religious
14 education. Although having to attend a different parish church or school
15 might be an inconvenience, defendants do not point to any evidence that
16 using alternative facilities would effectively prevent them "from
17 engaging in conduct or having a religious experience which the faith
18 mandates." Worldwide Church of God v. Philadelphia Church of God, Inc.,
19

20 ¹⁸(...continued)

21 Amendment takings provision. Parish and Parishioners' Class and Parish
22 Committee Memorandum in Opposition to Plaintiff's Third Motion for
23 Partial Summary Judgment at 58 n.28. The Parish Committee has not raised
24 a Fifth Amendment affirmative defense in this adversary proceeding (it
25 did raise a religious freedom affirmative defense, based on the First
26 Amendment, ORS 65.042, and RFRA), so the issue is not properly before
this court. In addition, I agree with the court in In re Washburn & Roberts, Inc., 17 B.R. 305 (Bankr. E.D. Wa. 1982), that application of
§ 544(a)(3) to avoid pre-1978 unrecorded transfers of property does not
violate the Fifth Amendment.

1 227 F.3d 1110, 1121 (9th Cir. 2000).

2 Therefore, RFRA does not preclude avoidance of the unrecorded
3 interests in these test properties.¹⁹

4 IV. CONCLUSION

5 The TCC has established that there is no genuine issue of material
6 fact and that it is entitled to judgment as a matter of law. Applying
7 § 544(a)(3) to avoid defendants' asserted unrecorded interests in the
8 test properties would not substantially burden their exercise of religion
9 and thereby violate RFRA. Therefore, the TCC is entitled to avoid any
10 unrecorded interests in the test properties, and to a declaration that
11 debtor holds both legal and equitable title to those properties so that
12 they are property of debtor's bankruptcy estate. Mr. Kennedy should
13 submit the order.

14 ####

15
16 cc: Howard M. Levine
17 Albert N. Kennedy
Brad T. Summers
Steven M. Hedberg
Brad S. Copeland
Phoebe Joan O'Neill
James Ray Streinz
David Foraker

20
21
22 ¹⁹ Nothing in this ruling is intended to establish a particular
23 remedy if defendants are able at trial to establish their RFRA defense.
24 If the defense is established, and I conclude that the remedy is that
25 unrecorded interests may be avoided in only a limited number of
properties, the parties may revisit whether these particular test
properties are the ones for which the asserted interests should be
26 avoided.